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IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

COUNTY OF KERN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, THE METRO WASTEWATER RECLAMATION DISTRICT (DENVER METRO), KING COUNTY, WASHINGTON, THE METROPOLITAN ST. LOUIS SEWER DISTRICT AND THE MILWAUKEE METROPOLITAN SEWERAGE DISTRICT IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
I. Metropolitan Water Reclamation District of Greater Chicago	2
II. Metro Wastewater Reclamation District	3
III. King County, Washington	4
IV. Metropolitan St. Louis Sewer District	6
V. Milwaukee Metropolitan Sewerage District	7
VI. Joint Interests of All *Amici* in This Case	9
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. *Amici's* Biosolids Programs Demonstrate That the Production and Reuse of Biosolids Substantially Affects Interstate Commerce and That Prudential Standing Does Not Require Biosolids to Cross State Lines	12

Contents

Page

A. The Generation and Use of Biosolids 13

B. Case Study – MWRD's Biosolids Program and Interstate Commerce ... 16

II. Biosolids Generators and Their Contractors Satisfy Prudential Standing and Need Access to Federal Court to Protect Their Programs 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

Cases

Associated Indus. of Mo. v. Lohman,
511 U.S. 641 (i994) 22

Association of Data Processing Serv. v. Camp,
397 U.S. 150 (1970) 22

Boston Stock Exchange v. State Tax Comm'n,
429 U.S. 318 (1977) 22

Clarke v. Sec. Indus. Ass'n,
479 U.S. 388 (1987) 12

Coastal Carting Ltd. v. Broward County,
75 F.Supp. 2d 1350 (S.D. Fla. 1999) 23

Diamond Waste, Inc. v. Monroe County,
939 F.2d 941 (11th Cir. 1991) 23

Environmental Waste Reductions, Inc. v. Reheis,
887 F. Supp. 1534 (N.D. Ga. 1994) 22

Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.,
504 U.S. 353 (1992) 21-22

Gonzalez v. Raich,
545 U.S. 1 (2005) 10, 13, 14

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Page

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Statutes

33 U.S.C. § 1345(d)(2) 15

Regulations

40 C.F.R. Part 503 ..... 14, 17

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Page

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G. Tian, T.C. Granato, F. D. Dinelli, and A. E. Cox, *Effectiveness of Biosolids in Enhancing Soil Microbial Populations and N Mineralization in Golf Course Putting Greens*, 40 Applied Soil Technology (2008) .. 13

T. C. Granato, P. Tata, R. I. Pietz, R. Lanyon, and C. Lue-Hing, *Suitability of Biosolids for Use as a Topsoil Substitute in Urban Reclamation Projects*, Proceedings of the Water Environment Federation/American Water Works Association Joint Residuals and Biosolids Management Conference, San Diego, California (2001) 13-14

The Metropolitan Water Reclamation District of Greater Chicago, the Metro Wastewater Reclamation District, King County, Washington, the Metropolitan St. Louis Sewer District and the Milwaukee Metropolitan Sewerage District (collectively "*amici*") respectfully submit this brief as *amici curiae* in support of the Petitioners.[1]

INTERESTS OF *AMICI CURIAE*

Amici concur in the arguments advanced by the Petitioners in their Petition for a Writ of *Certiorari* docketed on March 17, 2010 ("Petition"). *Amici* proffer the following additional reasons why *amici* consider it essential that the Court grant the Petition. The diverse *amici* entities recycle biosolids across the United States via land application and can attest to the importance of such programs, their ties to interstate commerce, and the need for access to the federal courts to protect land application from discriminatory local ordinances. *Amici* are concerned that long-standing safe and effective biosolids programs across the country are in jeopardy following the Ninth Circuit's decision to shield from

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[1] Pursuant to Supreme Court Rule 37.2(a), *amicus* MWRD provided timely notice to counsel of record for all parties of its intent to file the brief. Letters of consent to this filing are being submitted to the Clerk of the Court simultaneously with this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

judicial review local land application bans like Kern County's Measure E that discriminate against and burden interstate commerce.

I. Metropolitan Water Reclamation District of Greater Chicago ("MWRD")

Amicus curiae MWRD is one of the largest unified metropolitan sewerage and stormwater control districts in the world, providing vital public infrastructure and managing biosolids for over 5,000,000 people of northern Illinois. With a budget for 2010 of approximately $1.66 billion, MWRD collects and treats wastewater for an area of 883.5 square miles including the City of Chicago and 125 suburban communities. Every day, its seven water reclamation plants combined treat an average 1.4 billion gallons of wastewater. MWRD has led the nation in developing scientific, large-scale biosolids recycling over the last fifty years and is the recipient of many certifications and awards. MWRD recycles to the environment an average of 170,000 dry tons of biosolids annually making its program one of the largest of its kind in the country. MWRD biosolids are recycled on numerous farms in Illinois in as many as 12 different counties in any given year. On average approximately 1.5 million bushels of corn are produced annually using MWRD biosolids.

II. Metro Wastewater Reclamation District ("Denver Metro")

Amicus curiae Denver Metro is the wastewater treatment authority for most of the metropolitan Denver area, serving 59 local governments and a population of approximately 1.6 million people. Denver Metro collects and treats about 140 million gallons of wastewater per day and operates the largest wastewater treatment facility in the Rocky Mountain West.

Denver Metro generates daily nearly 70 dry tons of biosolids that are applied to farmland across the plains of eastern Colorado. It currently land applies biosolids at 135 sites in six counties. In addition, it recycles biosolids at its own 52,000-acre METROGRO Farm ("Farm") in Arapahoe and Elbert Counties, Colorado, located about 60 miles from the treatment facility. Denver Metro purchased the Farm to provide Denver Metro with a dedicated biosolids land application site that is completely under its control. Denver Metro hauls approximately 16-17 loads of biosolids per day, six days a week, to private sites or to the Farm. Currently, Denver Metro has a waiting list of local farmers requesting its biosolids.

Access to the federal courts to challenge discriminatory legislation targeting Denver Metro's biosolids is critical to Denver Metro and the many farmers who rely upon Denver Metro's biosolids as an economical fertilizer and organic soil amendment. Shortly after Denver Metro acquired the majority of the land for its METROGRO Farm, Elbert County issued a cease and desist order to Denver Metro to stop

applying biosolids to the Farm. The matter was resolved with the local government that issued the order prior to a federal court challenge being filed. If local governments are permitted to ban application of Denver Metro's biosolids without concern for violating the Commerce Clause, Denver Metro may have to undertake extremely expensive alternatives, including landfilling and transporting its biosolids much farther distances, increasing both the economic and environmental impacts to the public.

III. King County, Washington ("King County")

Amicus curiae King County is one of the largest counties in the United States, with almost two million residents, most of whom live in urban areas, including the City of Seattle. King County's Wastewater Treatment Division serves as a valuable example of another major utility located within the Ninth Circuit that, like the Petitioners, has established a safe and successful biosolids land application program in partnership with farmers, foresters and rural communities inside its state. While King County has established good relationships with all parties concerned with its program, the Ninth Circuit's ruling could directly impact King County's ability to protect its program from future hostile and discriminatory local efforts to reach across county lines and stop biosolids recycling.

Since the 1970s, King County (or its predecessor agency) has routinely recycled all its biosolids in a variety of composting, land reclamation, forestry, and agriculture projects. The county works closely with

scientists at the University of Washington and other researchers to constantly improve the value and sustainability of biosolids recycling. Today, the county's biosolids are recycled in five major projects in three Washington State counties, with partners that include farmers, forestland owners, state universities, state and local government agencies, and a major conservation organization.

King County views biosolids as a valuable resource, not a waste, consistent with the agency's organizational vision statement of "creating resources from wastewater." The King County land application program provides about 116,000 wet tons of biosolids annually for application by contracted forestry and composting customers in King County and agricultural customers in Douglas and Yakima counties in eastern Washington. Demand for biosolids exceeds the supply. The county maintains a staff of project managers that ensure each project is conforming to its contract, to state and federal regulations, and to environmental standards established by the county. After years of experience with land application projects, King County has concluded that collaborative contractual relationships with farm and forestry users provide the best approach to land application, coupled with active oversight from the county to ensure biosolids are recycled according to state-of-the-science best management practices.

Land application of biosolids plays a critical role in King County and indeed much of the developed world's wastewater infrastructure, and the ability to move biosolids freely across county lines to meet farm and forestry demand is vital to many utilities like the

Petitioners and King County. The county anticipates that biosolids' value as a fertilizer and soil amendment will grow and that new markets will emerge, such as the use of biosolids for carbon sequestration projects. King County has worked closely and successfully with local governments where biosolids are recycled to meet local concerns and conform to their environmental regulations. However, a fundamental tenet of this relationship is that local governments must observe constitutional and other limits on their powers, including Commerce Clause restrictions on local legislation that discriminates against biosolids generated beyond the enacting locality's borders. If such constitutional and other limits are not observed in the future, the impact of the Ninth Circuit's decision will undermine the right of King County and its farm and forestry partners to enforce these limits on localities and protect their programs and livelihoods.

IV. Metropolitan St. Louis Sewer District ("St. Louis")

Amicus curiae St. Louis currently incinerates most of its sewage sludge and disposes the remaining sludge in landfills. St. Louis has a permit to land apply biosolids in Missouri and the ability to access farmland in the future for land application is an important component of St. Louis' solids management plan because of the economic and environmental benefits of recycling biosolids to farmland. St. Louis also makes beneficial use of sewage sludge through composting projects that yield a biosolids product that fertilizes and improves soil.

St. Louis is currently considering several management options as it develops a 20-year biosolids management plan for the 65,000 dry tons of sludge generated per year at the seven St. Louis facilities. St. Louis considers land application to be one of the economical options that saves considerable dollars for the more than 1 million citizens of greater St. Louis that it serves. In addition, biosolids is a major recycling activity that helps meet long-term St. Louis goals for "green" sustainability. St. Louis would like to continue to use land application into the future. Local municipal or county restrictions that bar out-of-jurisdiction biosolids could force St. Louis to haul biosolids much farther to other jurisdictions and eliminate land application as an economical alternative.

V. Milwaukee Metropolitan Sewerage District ("Milwaukee")

Amicus curiae Milwaukee has been a national leader for almost a century in recycling biosolids and perfecting a bagged biosolids product for home and garden use around the United States. Milwaukee is acutely aware of the challenge from occasional local efforts to ban out-of-jurisdiction biosolids and the need for federal courts to constrain these efforts. Milwaukee purifies about 8 billion gallons of wastewater each year from 28 local governments spread over 411 square miles. Milwaukee serves about 1 million people.

Since 1926, Milwaukee has marketed biosolids nationwide as a successful fertilizer for land application under the trade name Milorganite® (Milwaukee Organic Nitrogen). Biosolids are heat dried, pelletized and sorted

by granular size for packaging. The Milorganite® program produces 40,000 dry tons annually, which would fill 1.6 million fifty-pound turf professional bags or 2.2 million thirty-six pound consumer bags. Once land applied, the Milorganite® enhances plant growth. It disappears into the soil after mineralization and natural decomposition. About one-third of the nitrogen and most of the phosphorus will be available the following growing season.

Milorganite® is registered as a specialty fertilizer and marketed in every state, both to the "big box" national chains, and to local garden centers and hardware stores. The Milorganite® business touches numerous commercial enterprises including advertisers, packagers and retailers. Milorganite® is also distributed wholesale in bulk to many other states. Milwaukee's operating costs assessed to sewer users are reduced by net Milorganite® fertilizer revenue.

Despite being permitted in every state, several local laws have banned Milorganite®. These measures are not based on any demonstrated product imperfection or safety risk. Rather, like Kern County's Measure E ban in this case, they serve only a parochial goal to keep bulk biosolids intended for farm use from coming into the jurisdiction. Such bans exclude not only direct land application of biosolids generated by outside municipalities, like the activities conducted by Petitioners and their contractors, but also prohibit possession or use of the commercialized safe and effective Milorganite® product whose origins similarly lie outside the borders of the enacting locality.

VI. Joint Interests of All *Amici* in This Case

The *amici* represent local public entities from various regions of the country that reclaim wastewater. Each faces diverse challenges, such as varied geological and hydrological conditions and levels of urbanization, but all share a common interest to provide the Court the local, on-the-ground perspective of the importance of land application of biosolids to their operations and the threat from discriminatory, anti-urban local legislation of the type passed in Kern County. The *amici* believe that detailing the nature and extent of their biosolids operations will help demonstrate that the business of producing and recycling biosolids to the environment is a national business that is federally regulated and impacts many aspects of the national economy.

The *amici* conduct biosolids operations similar to the Petitioners and would be adversely affected if access to the protections of the Commerce Clause was denied based on maintenance of an exceedingly narrow view of prudential standing as declared in the decision below. Each *amicus* has more than one story to tell regarding public opposition faced by its employees, contractors and farmers with respect to their biosolids product. *Amici* and other wastewater treatment agencies and their contractors periodically confront local legislative efforts targeting biosolids recycling; most are resolved without litigation, in no small part because localities come to understand that regulations in violation of the Commerce Clause can lead to federal liability. The possibility that *amici* will be foreclosed from availing themselves of the protections of the Commerce Clause

to counter local protectionist measures threatens expensive disruptions to biosolids management and cost increases for tax and rate payers as more expensive disposal options would have to be rapidly developed to accommodate the continuous generation of biosolids.

The examination of the *amici's* biosolids programs provided herein demonstrates that the production and utilization of biosolids are economic activities that have a "substantial effect on interstate commerce." *See Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). As such, the *amici*, similar to the Petitioners in this case, fall within the zone of interests protected by the dormant Commerce Clause. It is of vital importance to the *amici* that they preserve this important avenue of constitutional protection to bridge the "Not In My Backyard" attitudes that they encounter, particularly with respect to land application of biosolids.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that biosolids recycling operations and the fertilizer it produces do not involve articles in interstate commerce simply because the biosolids do not cross state lines. Biosolids recycling — involving sewage treatment plants with infrastructure such as digesters, dryers, dewatering equipment and centrifuges that are dedicated solely to biosolids operations, long-distance trucking, farming, crop sales, and intense regulation at each step of the process by the United States Environmental Protection Agency ("USEPA") — plainly meets the Court's low threshold for interstate commerce.

The *amici's* operations show that biosolids recycling not only is interstate commerce warranting Commerce Clause protection, but also that denying prudential standing for participants in this industry is an important issue that merits Supreme Court review. The *amici* and other public entities have spent many billions of dollars to research, develop and implement land application programs that offer a green answer to a waste disposal dilemma to which every single resident of the United States contributes. Applying biosolids to the land completes a natural cycle in the environment by returning organic material to the soil. Through the *amici's* biosolids programs a waste product becomes a valuable resource. In addition to supporting the *amici's* environmental strategy, land application is a critical economic component of sustainable wastewater treatment. USEPA supports land application as a preferred method of managing biosolids. *See e.g.*, USEPA, *Biosolids Recycling: Beneficial Technology for a Better Environment,* EPA 832-R-94-009 (June 1984), available at http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000478L.txt ("[EPA] will continue to promote practices that provide for the beneficial use of municipal sewage sludge biosolids, while maintaining or improving environmental quality and protecting human health.")

In spite of biosolids' safety and their superior agronomic and environmental qualities, the public in some quarters expresses hostility to application of biosolids in their communities. *Amici*, other wastewater agencies, and the larger biosolids industry have worked vigorously to improve public acceptance of biosolids recycling and many communities now embrace the

benefits of biosolids. Nonetheless, it is important that the constraints on discriminatory legislation imposed by the Constitution remain available as a tool to *amici* to ensure that localities do not indulge bias and prejudice by targeting out-of-town biosolids generators. *Amici* need to be assured that they have continued access to the federal courts to challenge local measures that would ban land application of biosolids.

ARGUMENT

I. *Amici's* Biosolids Programs Demonstrate That the Production and Reuse of Biosolids Substantially Affects Interstate Commerce and That Prudential Standing Does Not Require Biosolids to Cross State Lines

Together the *amici* produce nearly 300,000 dry tons of biosolids annually that are shipped via truck and rail to diverse users such as farmers, foresters, park districts, golf courses, home gardeners and landfill operators. Whether their biosolids are recycled through land application within their respective states of Illinois, Colorado, Washington, Missouri and Wisconsin or whether they are recycled and applied to lands in neighboring or distant states, *amici's* biosolids operations establish that biosolids are an article in interstate commerce, and further that *amici* produce, transport, trade and use an economic commodity in the interstate market that allows the *amici* to fall within the zone of interests that the dormant Commerce Clause was designed to protect. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (noting that zone of interest test "is not meant to be especially demanding").

Certainly, the Court's rationale that six marijuana plants grown for home consumption have a sufficient nexus to interstate commerce for Commerce Clause purposes applies to afford protection to the biosolids industry. *See Gonzalez*, 545 U.S. at 9.

A. The Generation and Use of Biosolids

Biosolids are a nutrient-rich organic material that is produced when domestic sewage is processed and solid residuals are separated from the wastewater. The rigorous treatment process that produces biosolids, which is dictated by USEPA and state standards, includes strict enforcement of industrial pretreatment standards, and reduction of microorganisms and odorous compounds.[2] In addition to being rich in organic matter that improves soil quality, biosolids contain an abundance of the primary plant nutrients nitrogen and phosphorus, as well as micronutrients. Biosolids are an ideal substitute for expensive topsoil and improve the fertility and productivity of almost any land to which they are applied.[3] Most biosolids are applied in bulk but

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[2] *Amici* contend that in some measure the narrow view taken by the Ninth Circuit regarding the interstate nature of the biosolids market simply reflects a lack of familiarity with the product that is biosolids. Biosolids are no less a national business than other more traditional and widely recognized fertilizer products.

[3] G. Tian, T. C. Granato, F. D. Dinelli, and A. E. Cox, *Effectiveness of Biosolids in Enhancing Soil Microbial Populations and N Mineralization in Golf Course Putting Greens*. 40 Applied Soil Ecology, 381-386 (2008); T. C. Granato, P. Tata, R. I. Pietz, R. Lanyon, and C. Lue-Hing, *Suitability of* (Cont'd)

many programs distribute biosolids in bags for home garden and lawn use, most notably *amicus* Milwaukee Metropolitan Sewerage District's Milorganite[9] product that is sold across America.

Two reports of the National Research Council ("NRC") of the National Academy of Sciences have considered whether land application of biosolids is safe and beneficial. In 1996, NRC published *Use of Reclaimed Water and Sewage Sludge in Food Crop Production.* The report concluded that the application of biosolids to farmland,

> when practiced in accordance with existing federal guidelines and regulations, presents negligible risk to the consumer, to crop production, and to the environment. Current technology to remove pollutants from wastewater, coupled with existing regulations and guidelines governing the use of reclaimed wastewater and sludge in crop production, are adequate to protect human health and the environment.

Id. at 12. In 2000, USEPA asked NRC to review the science and methods supporting EPA's biosolids regulations -- 40 C.F.R. Part 503 -- to address concerns

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(Cont'd)

Biosolids for Use as a Topsoil Substitute in Urban Reclamation Projects, Proceedings of the Water Environment Federation/ American Water Works Association Joint Residuals and Biosolids Management Conference, San Diego, California (2001).

regarding human health impacts of land application of biosolids. As a result of its "search[ ] for evidence on human health effects related to biosolids," the NRC's 2002 report reached several important conclusions:

- "There is no documented scientific evidence that the Part 503 Rule has failed to protect public health."

- "[A] causal association between biosolids exposures and adverse health outcomes has not been documented."

- "There are no scientifically documented outbreaks or excess illnesses that have occurred from microorganisms in treated biosolids."

National Research Council, *National Biosolids Applied to Land: Advancing Standards and Practices*, at 3-4, 207 (2002). The NRC also observed that "persistent uncertainties" regarding the safety of land application necessitate more scientific research, but it did not call for any specific changes to the USEPA regulations governing biosolids. As directed by § 405(d)(2) of the Clean Water Act, 33 U.S.C. § 1345(d)(2), USEPA must conduct regular reviews to determine whether regulation of additional constituents found in biosolids is warranted. USEPA continues to reevaluate the adequacy of the Part 503 regulations and has not found a need to establish more stringent requirements or regulate additional pollutants.

In addition to the scientific and regulatory support for recycling biosolids, the programs of *amici* and others have long track records of safety and environmental benefits, justifying their large investments of public funds in these programs. Beyond their utility as a safe and effective soil fertilizer, recycled biosolids also yield energy savings and climate change mitigation advantages by substituting for commercial inorganic nitrogen fertilizers whose production depends heavily on fossil fuels.

B. Case Study – MWRD's Biosolids Program and Interstate Commerce

The biosolids program of *amicus curiae* MWRD stands as a good example of a large-scale producer of this important fertilizer. Since the MWRD began treating wastewater, it has used or experimented with virtually every biosolids management option available, and has helped pioneer modern biosolids science and technology in the last fifty years.[4]

A snapshot taken of MWRD's biosolids operations for the year 2008 leaves no doubt regarding the large-scale nature of the business of beneficial reuse of biosolids.[5] In 2008, the MWRD produced 229,000 dry

[4] C. Lue-Hing, R. I. Pietz, J. Gschwind, T. C. Granato, and D. R. Zenz. 1994. *Metropolitan Water Reclamation District of Greater Chicago's Experience on Beneficial Use of Sewage Sludge: Assessing the Impacts Upon Water, Soil, and Crops*: Report from Transactions of 15th World Congress of Soil Science, Acapulco, Mexico, July 10-16, 1994.

[5] The most recent year for which actual use numbers are available is 2008.

tons of biosolids and beneficially recycled to the environment 205,000 dry tons of biosolids, at a cost to the local taxpayers of $59,207,795. From 2003 to 2008, MWRD expended over $300 million to process and utilize nearly 1 million dry tons of biosolids.

MWRD biosolids are recycled to the environment to reclaim mine spoil land,[6] enrich farmland as organic fertilizer, augment sanitary landfills as daily and final cover, and aid in the construction or renovation of recreational areas, such as golf courses, sports fields and parks. Since 1972, most of the MWRD's biosolids were utilized through land application.

Through MWRD's farmland application program, biosolids are utilized as a nutrient source for crops in 12 Illinois counties. Over the course of the program, several hundred farms have fertilized crops and improved their soils with MWRD biosolids. The land application of biosolids to Illinois farms is a win-win situation for MWRD as biosolids producer and to the farmers as biosolids users. Farmland application is an economical manner of reuse for MWRD, and biosolids

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[6] Between 1972 and 2004, over one million dry tons of MWRD biosolids were used for environmental rejuvenation of a former coal strip mine in Fulton County, Illinois. MWRD retains ownership of over 13,500 acres of land in Fulton County and will resume land application should the outlet prove more cost-effective in the future. Research performed at the site by MWRD in collaboration with several universities and federal agencies was used in developing the Part 503 biosolids regulations.

offer a significant cost savings to Illinois farmers over chemical fertilizers.[7]

Illinois farmers grow various crops with MWRD biosolids for both animal feed and human consumption, including corn for grain and soybeans. All of these cash crops enter interstate markets for grain. Corn grown with biosolids is sold to grain elevators, which are owned by local business owners or co-operatives. Grain elevators, in turn, sell to national processing companies, which use the corn as basis for animal feed, or for processing into products like corn oil, corn syrup, corn chips, and cereal, or to fuel processors that process the corn into ethanol. Soybeans grown on farmland to which biosolids have been applied also enter the commerce stream as they are typically processed into soybean oil and soybean meal by national conglomerates, and then incorporated into a host of different food products or used for biodiesel.

MWRD, like many agencies, contracts with national and local biosolids management companies to manage the biosolids from the plant to the farm and oversee

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[7] For farmers, one commentator conservatively estimated that in 2005-2006 a typical Illinois corn farm of 200 acres added 160 units of nitrogen to each acre from commercial fertilizer at an average cost of $56 per acre, or an $11,200 expense. Corn producers also applied phosphorus and potash at an average cost of an additional $4,000 to a 200-acre farm. The same farmer using biosolids applied at no cost to the farmer would net more than $15,000 in savings, exclusive of the benefits to soil and the environment. Michelle Stewart, *Farmers Win with Biosolids*, Illinois Rural Water Association's "Water Ways," Volume 2 (Winter 2005-2006).

regulatory compliance. MWRD pays the contractor to truck the biosolids, procure the farmland application sites, perform agronomic services to the farmers and provide liaison with local governments, the media and the public. The companies currently under contract perform services for MWRD in Illinois counties, though both conduct multi-state operations.[8]

Residuals management is big business. The current three-year contracts were awarded by MWRD at a cost of $12,480,000. The primary contractor estimates that it land applies MWRD biosolids to 10,000 to 15,000 acres of Illinois farmland annually. Local protectionist measures prohibiting land application of MWRD's biosolids would threaten this 50-employee, family business' economic survival as well as damage the companion industries it supports, such as the companies that produce the new tractors, front-end loaders and spreaders purchased each season by the contractor.

Further evidence of the interstate nature of MWRD's biosolids product is found in the recent addition of a new "pelletizer" facility at MWRD's Stickney Water Reclamation Plant. The facility heat-dries biosolids and creates small fertilizer pellets suitable for various uses such as citrus and golf course fertilization, commercial fertilizer blending, horticulture

[8] One contractor is an affiliate of the largest recycler of organic residuals in the United States. Its midwest division website indicates that it performs services in 33 states and had revenues of over $344 million in 2009. The primary contractor, headquartered in an Illinois county more than 50 miles south of Chicago, states it has capability to service all of Illinois, as well as the entire United States for special projects.

and silvaculture. Operated for MWRD by Veolia Water North America, a company that serves 600 communities, under a contract with Metropolitan Biosolids Management, LLC, the facility is slated to produce 150 tons of dried beneficial biosolids daily. The pelletized product is a marketable product, which has been shipped in bulk to Illinois counties and numerous other states for land application.

If the Illinois counties where MWRD currently land applies biosolids instigated ordinances such as that passed by Kern County, MWRD would be forced to revert to its former practice of dumping those waste residuals in landfills. The current land application of biosolids program diverts hundreds of thousands of tons of material away from being dumped unusable in landfills. MWRD estimates cost savings of $2 million to $3 million annually from beneficial reuse of biosolids over landfilling. Along with increased cost of landfilling, landfills are a limited outlet with finite capacity, and new landfills will be more difficult to site, and most likely at farther distances from MWRD with correspondingly higher transportation costs. Farmland, by contrast, represents a nearly unlimited and renewable recycling resource as MWRD has yet to produce the biosolids quantities requested by Illinois farmers.

The concerns of MWRD regarding ordinances like Kern's are real and based upon both past and current practices of local governing bodies. Rural townships in Illinois have attempted to ban land application of MWRD biosolids. In Pembroke Township, located in Kankakee County, Illinois where a significant portion of MWRD biosolids farmland application occurs, the township

electors in 2002 voted "an immediate halt of importing any type of waste sludge into Pembroke Township." This vote passed in spite of MWRD mounting an extensive public information effort including conducting a town hall meeting with the Pembroke Township Board of Trustees and residents. Ultimately the ban on importation of sludge was not enacted into an ordinance. Nevertheless, MWRD contractors no longer land apply biosolids to Pembroke Township farms. Recently, MWRD contractors encountered another similar ban directed to "all municipality-sludge application from outside of the township," by Rooks Creek Township, in Livingston County, Illinois. The effect of this ban is currently under investigation by the MWRD's relevant biosolids contractor.

II. Biosolids Generators and Their Contractors Satisfy Prudential Standing and Need Access to Federal Court to Protect Their Programs

The Ninth Circuit's ruling means that the *amici* — most of who rely heavily on their own states for land application sites — would not have prudential standing to challenge an ordinance that, like Kern's, discriminates against out-of-county biosolids. Contrary to the Ninth Circuit holding, the Court repeatedly has explained that the Commerce Clause bar on discriminatory legislation extends to local efforts to erect county barriers to interstate commerce: "[A] State (*or one of its political subdivisions*) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through subdivisions of the State*, rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*,

504 U.S. 353, 361 (1992) (emphasis added); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) ("[D]iscrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment."). Moreover, as the above discussion of the business of biosolids proves, parties similar to the Petitioners are "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory [barriers to] their business and they allege that the [barrier] indirectly infringes on that right. Thus, they are 'arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) (stock exchanges found to have prudential standing to mount a Commerce Clause challenge to a discriminatory state tax) (*citing Association of Data Processing Serv. v. Camp.*, 397 U.S. 150, 153 (1970)).

Amici are confident that their biosolids programs fit within the national jurisprudence on the Commerce Clause and the protections it provides. Many courts have applied the Court's teachings on the scope of the Commerce Clause to invalidate measures which sought to or had the effect of restricting waste importation between counties within a state, even where the facts did not establish actual effects on goods crossing state lines. *See Environmental Waste Reductions, Inc. v. Reheis*, 887 F. Supp. 1534, 1568 (N.D. Ga. 1994) ("A legislative provision which limits the movement of waste between counties in Georgia based solely on its geographic origin has economic effects interstate in reach and thus discriminates against interstate

commerce."); *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 943 (11th Cir. 1991) (invalidating an ordinance purporting to restrict waste from being "transported into [the County] from other counties and locations."); *In re Southeast Ark. Landfill, Inc. v. Ark. Dep't of Pollution Control & Ecology*, 981 F.2d 372, 376-77 (8th Cir. 1992) (rejecting a discriminatory ban on "out-of-district" waste); *Mullis Tree Serv., Inc., v. Bibb County*, 822 F. Supp. 738, 748 (M.D. Ga. 1993) (invalidating an ordinance that discriminated against "out-of-county waste on its face" where the county offered no reason, apart from origin, "for treating out-of-county waste differently from in-county waste."); *Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health & Envtl. Control*, 843 F. Supp. 100, 109 (D.S.C. 1992) (invalidating an ordinance limiting a landfill's waste stream to a seven county region because "[i]f a county or region could ban the importation of waste at the county or region border, then the cumulative effect of such bans by all or many of the counties would have the same effect as a state-wide ban"); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350, 1354 (S.D. Fla. 1999) (rejecting a county's argument that county export barriers would not affect interstate commerce because, due to the county's location at the "extreme southern end of the Florida Peninsula," the waste would "remain in Florida because it would be economically unfeasible to transport the waste out of state").

Under the Ninth Circuit's rationale, *amici* would be relegated to state court challenges in the jurisdiction where the offending legislation was enacted, an unjustifiable deprival of a preferred federal forum for a

federal claim. This is a very real scenario based on the experiences of *amici* and other agencies that has led them to support the Petitioners.

CONCLUSION

Amici are committed to environmentally sound management and recycling of biosolids and have a long record of working with local governments and other stakeholders to ensure that land application benefits both the landowner and the larger community. That cooperation depends on constitutional protections against discriminatory legislation, and access to the federal courts to vindicate those protections. *Amici* ask that the Petition be granted.

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